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Supreme Ct.
FILED
JAN 14 2002
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IN THE
SUPREME COURT OF THE UNITED STATES

Case Number 01-948

DAVE DORMIRE, *Superintendent,*
Jefferson City Correctional Center

Petitioner,

vs.

JAMES KOSTE,

Respondent.

MOTION TO PROCEED IN FORMA PAUPERIS

Respondent, James Koste, in accordance with Rule 39 of this Court, respectfully moves the Court to proceed in forma pauperis, and in support thereof states as follows:

1. He is an indigent inmate of the Jefferson City Correctional Center, Jefferson City, Missouri.

2. He was granted in forma pauperis status by the United States District Court for the Eastern District of Missouri and the United States Court of Appeals for the Eighth Circuit, and the Court of Appeals appointed the undersigned attorney to represent Respondent on appeal pursuant to the provisions of the Criminal Justice Act of 1964, as amended.

For these reasons, James Koste respectfully moves the Court for leave to file

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17 pp

the attached Brief in Opposition to the Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit without the filing of costs and to proceed in forma pauperis before this Court.

Dated January 12, 2002

Respectfully submitted,

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ATTORNEY FOR RESPONDENT

Case Number 01-948

* * * * *

IN THE

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DAVE DORMIRE, *Superintendent,*
Jefferson City Correctional Center

Petitioner,

vs.

JAMES KOSTE,

Respondent.

On Petition for Writ of Certiorari
To the United States Court of Appeals for the Eighth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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Case Number 01-948

* * * * *

IN THE

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RESPONDENT'S BRIEF IN OPPOSITION

REASONS FOR DENYING THE WRIT

I. THE EIGHTH CIRCUIT PROPERLY APPLIED LONG ESTABLISHED SUPREME COURT PRECEDENT IN A MANNER THAT DOES NOT CONFLICT WITH ANY OTHER CIRCUIT. PETITIONER ASKS THIS COURT TO DECIDE AN ISSUE NOT RAISED BY THIS CASE.

The law has long been clear that when a potential conflict of interest is brought to the attention of the trial court, the court must either assure that conflict free counsel is provided or take other steps to adequately inquire into the conflict. If the court takes neither action, prejudice to the defendant will be

presumed and the defendant is entitled to automatic reversal. *Holloway v. Arkansas*, 435 U.S. 475, 484-491 (1978). For the purpose of 28 U.S.C. §2254(d), the rule of *Holloway* is clearly established federal law as determined by this Court. *See, Campbell v. Rice*, 265 F.3d 878, 889-890 (9th Cir. 2001); *Atley v. Ault*, 191 F.3d 865, 868-871 (8th Cir. 1999).

Petitioner is simply wrong when he argues that the "automatic reversal" rule of *Holloway* is limited to cases in which the defense attorney is representing multiple defendants. In *Wood v. Georgia*, 450 U.S. 1 (1981) this Court itself applied *Holloway* and *Cuyler v. Sullivan*, 446 U.S. 335 (1980) to a conflict that did *not* involve a single lawyer who represented multiple defendants in the same case. In *Wood* the conflict was between the criminal defendant and his employer who paid defense counsel. The employer was not a defendant at all. Nevertheless, the Court applied the *Cuyler* reasoning[1] to a case which did not involve multiple representation of codefendants. The Court said:

> Where a constitutional right to counsel exists, our Sixth Amendment cases hold that there is a correlative right to representation that is free from conflicts of interest. *E.g., Cuyler v. Sullivan*, 446 U.S. 335 (1980); *Holloway v. Arkansas*, 435 U.S. 475, 481 (1978). Here, petitioners were represented by their employer's lawyer, who may not have pursued their interests single-mindedly. It was his duty originally at sentencing and later at the revocation hearing, to seek to convince the court to be lenient. On the record before us, we cannot be sure whether counsel was influenced in his basic strategic

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[1] *Cuyler* was applied, rather than *Holloway*, because the potential conflict was not raised in the trial court. Indeed, it was never raised in *any* Court, including the U.S. Supreme Court, and the lawyer who had the potential conflict actually argued the case in the Supreme Court. *See Wood*, 450 U.S. at 266 n. 8 and 450 U.S. at 275-276 (White, J., *dissenting*).

> decisions by the interests of the employer who hired him. If this was the case, the due process rights of petitioners were not respected at the revocation hearing, or at earlier stages of the proceedings below.

Woods v. Georgia, 450 U.S. at 271-272.

It is thus apparent that long before this case was tried, this Court had made clear that the rule of *Holloway* applied to any case in which defense counsel had a conflict which prevented him or her from pursing the defendant's "interest single-mindedly." The courts of appeal have understood that the rule of *Holloway* applies to a variety of conflicts of interest in addition to the situation in which a single lawyer represented codefendants with conflicting interests. The circuits have applied *Holloway* to situations in which a defendant's counsel owes conflicting duties to that defendant and some other third person. *United States v. Soto Hernandez*, 849 F.2d 1325, 1328 (10th Cir. 1988), or when the interests of the defendant conflict with those of the lawyer. *See, Solina v. United States*, 709 F.2d 160, 167-169 (2nd Cir. 1983); *Walberg v. Israel*, 706 F.2d 1071, 1075 (7th Cir. 1985). *See also, Campbell v. Rice, supra.* and *Atley v. Ault, supra.*

At page 8 of the certiorari petition, the Superintendent cites several cases which he says conflicts with the Eighth Circuit's decision in this case. That is not true. In fact, none of the cases are factually or legally in the same posture as this case. This case involves the "automatic reversal" rule of *Holloway v. Arkansas*, not the issue of what standard is applied when a defendant raised the conflict-of-interest question on appeal or in post-conviction proceedings for the first time. The automatic rule of *Holloway* applies when: (1) the conflict is brought to the trial

court's attention prior to conviction; and (2) the trial court makes no inquiry. None of the cases cited by Petitioner meet the two prerequisites of *Holloway*.

Beets v. Scott, 65 F.3d 1258 (5th Cir. 1995) (*en banc*); *United States v. O'Neil*, 118 F.3d 65 (2nd Cir. 1997); and *United States v. Moree*, 220 F.3d 65 (2nd Cir. 2000), are not *Holloway* cases at all. In these cases the attorneys' alleged conflicts were not brought to the attention of the trial court until after conviction, thus taking the case entirely out of the "automatic reversal" rule of *Holloway*. In such cases, it might well be that the two prong requirement of *Strickland v. Washington*, 466 U.S. 668 (1984) applies to such post-conviction review, but such issue is simply not raised by this case.

United States v. White, 174 F.3d 290, 294-297 (2nd Cir. 1999) was a *Holloway* case, but one in which the trial court made the required inquiry when informed of the conflict by the defendant. Similarly, in *United States v. Barnes*, 990 F.2d 1426, 1438 (4th Cir. 1993) the trial court made an inquiry and denied the defendant's request for the appointment of new counsel when the defendant claimed his attorney had a conflict of interest because the defendant himself had filed a bar complaint against his own attorney. Again, if there is an inquiry by the trial court, *Holloway* does not require automatic reversal and a different standard is applied. But the question of what standard applies to those circumstances is not raised by this case.

In the final case cited by Petitioner, *Hale v. Gibson*, 227 F.3d 1298 (10th Cir. 1995), although it is not clear whether either of the requirements of *Holloway* were

met, the Court of Appeals found that no conflict of interest ever existed. Additionally, it appears that the conflict of interest issue was raised for the first time on habeas corpus appeal. Again, that is a very different procedural posture than in the instant case.

Petitioner asks this Court to decide an issue which is not presented by this case, namely what standard is applied when the requirements of *Holloway* are *not* met, but the defendant claims after conviction that his lawyer had a conflict of interest. Simply stated, that issue is not presented by Mr. Koste's case, and this case does not provide an appropriate vehicle for this Court's consideration of the question presented by Petitioner.

II. GIVEN THE MANNER IN WHICH THE STATE COURT ACCEPTED RESPONDENT'S PLEA OF GUILTY, GRANTING CERTIORARI IN THIS CASE IS INAPPROPRIATE.

Even if the issue presented by Petitioner is properly raised by this case, this case is an inappropriate vehicle for deciding such issue. Due to the idiosyncratic manner in which the state circuit judge conducted the plea colloquy and sentencing, several of Respondent's constitutional rights were violated in addition to his right to conflict free counsel. Although these issues were not reached by the Court of Appeals, the record as a whole precludes the Court from deciding the issue presented by the Superintendent because of the overall defects in the record.

The guilty plea and sentencing occurred on the same day in this case, but Petitioner makes virtually no reference to the manner in which the state circuit

judge conducted the plea colloquy and sentencing. The indictment in Respondent's case charged five identical crimes. The statute violated is the same, the victim is the same, and the dates of the offense are the same in every count. The prosecution and defense had agreed that Respondent would plead guilty in return for a sentence to run concurrently with a sentence Mr. Koste was then serving. At the beginning of the hearing, Respondent asked permission to make a statement:

DEFENDANT: Am I allowed to make a statement before I enter my plea?

THE COURT: I ain't taking no Alpha[2] plea.

DEFENDANT: I know that, Your Honor.

THE COURT: You can make a statement after your plea, but I am not listening to nothing before you plead.

Don't say nothing crazy like you didn't do nothing.

(Petitioner's Appendix at 69).

The judge then continued with the plea colloquy, but when Mr. Koste failed to admit that he had committed the crime, the Judge became angry, and the following colloquy ensured:

THE COURT: Are you pleading guilty because you are guilty?

DEFENDANT: I will take the 5th on that, Your Honor.

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[2] Respondent assumes that "Alpha plea" refers to an "Alford plea," in which the defendant pleads guilty, while denying that he committed the offense. *See, North Carolina v. Alford*, 400 U.S. 25 (1970).

THE COURT: I told you, Terri[3], I don't take Alpha pleas. He's got to tell me he did it.

DEFENDANT: I will plead guilty.

THE COURT: No, it's a difference between "I will plead guilty" and you committed it. Did you authorized (*sic*)her to plea you guilty? I am going to ask you whether or not you did some acts. You got to tell me you did them, man, because I don't take Alpha pleas. You understand that?

DEFENDANT: I don't understand that, Your Honor.

THE COURT: Did you authorize Ms. Johnson to plead you guilty?

DEFENDANT: Yes, sir.

THE COURT: You are pleading guilty because you're guilty.

DEFENDANT: Yes.

COURT: Okay. Because if you don't I am going to let the jury decide it then. You will be facing consecutive time instead of concurrent time.

(Appendix 70-71).

The prosecutor then made a statement to the court which constituted the factual basis for the plea (*Appendix* 73-74). The statements were identical for each count of the indictment. The prosecutor read the charges in the indictment and added the fact that the "sodomy" consisted of the Respondent putting his penis in the victim's mouth. Neither the specific age of the victim, the specific dates of the offenses, nor the specific places the crimes took place were supplied. The Respondent then said he heard the prosecutor and that he committed those

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[3] The Court was apparently addressing defense counsel, Terri Johnson.

offenses. At no time did anyone inform the Respondent of the constitutional rights he was giving up by pleading guilty, the maximum penalties for the crimes, or the elements of the offenses. The circuit court utterly failed to comply with the plea procedure specified in Missouri Supreme Court Rule 24.02(b).[4]

In short, the plea proceedings are facially defective. The plea proceedings did not comply with the State Court rule or the constitutional requirements mandated by *Boykin v. Alabama*, 395 U.S. 238, 244 (1969). In *Boykin* this Court found reversible error when a trial judge accepted a defendant's guilty plea without creating a record affirmatively showing that the plea was knowing and voluntary. 395 U.S. at 242. In *Boykin* this Court specified three constitutional rights--the privilege against compulsory self-incrimination, the right to trial by jury, and the right to confront one's accusers--which a defendant must waive before entering

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[4] This Rule States:

Advice to Defendant. Except as provided by Rule 31.03, before accepting a plea of guilty, the court must address the defendant personally in open court, and inform him of, and determine that he understands, the following:

1. The nature of the charge to which the plea is offered, the mandatory minimum penalty provided by law, if any, and the maximum possible penalty provided by law; and

2. If the defendant is not represented by an attorney, that he has the right to be represented by an attorney at every stage of the proceedings against him and, if necessary, one will be appointed to represent him; and

3. That he has the right to plead not guilty or to persist in that plea if it has already been made, and that he has the right to be tried by a jury and at that trial has the right to the assistance of counsel, the right to confront and cross-examine witnesses against him, and the right not to be compelled to incriminate himself; and

4. That if he pleads guilty there will not be a further trial of any kind, so that by pleading guilty he waives the right to a trial.

a constitutionally valid plea of guilty. Waiver of these rights could not be presumed from a silent record. In this case, none of those constitutional rights were mentioned by the court or counsel, much less waived by Respondent. There is no showing that the plea was voluntary or that there was even a factual basis for the plea. Indeed, the comments of the judge ("...if you don't [plead guilty] I am going to let the jury decide it then. You will be facing consecutive time instead of concurrent time.") might well be understood as threat of a more severe sentence if the Respondent refused to plead guilty.

The Eighth Circuit found it unnecessary to consider the obvious constitutional issues raised by this record, instead focusing on the state court's failure to inquire into the conflict of interest brought to its attention by Respondent.

After accepting the plea and sentencing Respondent to 30 years in prison, the state circuit judge, as required by Missouri Supreme Court Rule 29.07(b)(4), asked Mr. Koste whether he was satisfied with his lawyer. The Respondent told the state judge that he was not satisfied with his appointed counsel and that he had a conflict of interest with his lawyer because Respondent had filed a post conviction petition (PCR) in another case alleging that this same lawyer had provided constitutionally ineffective representation (Appendix 82). Respondent said that previously he had filed a motion objecting to the continuation of his appointed attorney due to this conflict, *id.* That motion was never acted upon by the circuit court. In response to this statement the judge said:

> The Court is not going to try that PCR as being no legal suit against Ms. Johnson [defense counsel] and the Court herein denies that.

(Appendix 83). Koste responded by expressing the belief that the state trial judge was denying him Due Process of Law. *Id.*

It is plain from the foregoing that the state judge was not willing to listen to *anything* Mr. Koste had to say except that he was guilty as charged. Of course, the judge offered Koste the option of going to trial, where he would be facing a consecutive sentence. In the coercive atmosphere of these proceedings, the failure of the state judge to inquire into the conflict between the Respondent and his lawyer is just one of several rather obvious constitutional defects in the plea and sentencing proceedings. The issue the Petitioner wants this Court to review can not be separated from the other issues which are presented by this record. Considering the nature of the record as a whole, certiorari review of the issue raised by Petitioner is not appropriate.

CONCLUSION

For all of the foregoing reasons, the instant petition should be denied.

Respectfully submitted,

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